

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 99-0559
RESPONSIBLE OFFICER
SALES TAX and WITHHOLDING TAX
For Tax Periods: 1995-1998

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

Issues

1. SALES TAX-Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995).

Taxpayer protests the assessment of responsible officer liability for unpaid sales taxes.

2. WITHHOLDING TAX-Responsible Officer Liability

Authority: IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995).

Taxpayer protests the assessment of responsible officer liability for unpaid withholding taxes.

Statement of Facts

Taxpayer was an officer of a corporation which did not remit the proper amount of sales taxes and withholding taxes to Indiana. Taxpayer was personally assessed for the taxes and protested this assessment. Taxpayer protested the assessment. More facts will be provided as necessary.

1. SALES TAX-Responsible Officer Liability

Discussion

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 which provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The issue to be determined is whether or not Taxpayer had the statutory duty to remit the sales taxes. Taxpayer has the burden of proving that he did not have the statutory duty to see that the taxes are properly remitted to Indiana. IC 6-8.1-5-1 (b).

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid." Taxpayer submitted documentation which indicated that he was a minority shareholder in the corporation which owned and operated the restaurant franchises with unremitted sales tax liabilities. Another officer's resume indicated that the other officer oversaw all of the operations of the corporation. That officer also had the "ultimate responsibility" for the restaurants and oversaw accounts payable. Depositions and court documentation indicate that another officer used corporation funds on a regular basis to pay that officer's personal and family liabilities. Documentation also indicates that the Internal Revenue Service found that Taxpayer was not responsible for unpaid federal trust taxes arising from the Indiana restaurants involved in the subject assessments. Taxpayer's employment by the corporation was terminated August 6, 1997. His stock was transferred to another officer. Taxpayer has sustained his burden of proving that he did not have the statutory duty to see that the sales taxes were properly remitted to Indiana.

Finding

Taxpayer's protest is sustained.

2. WITHHOLDING TAX-Responsible Officer Liability

Discussion

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that “In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest.” The issue to be determined is whether or not Taxpayer was under a duty to remit the corporate withholding taxes to the state.

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 270 (Ind.1995) at page 273: “The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. “ Taxpayer submitted documentation which indicated that he was a minority shareholder in the corporation which owned and operated the restaurant franchises with unremitted withholding tax liabilities. Another officer’s resume indicated that the other officer oversaw all of the operations of the corporation. That officer also had the “ultimate responsibility” for the restaurants and oversaw accounts payable. Depositions and court documentation indicate that another officer used corporation funds on a regular basis to pay that officer’s personal and family liabilities. Documentation also indicates that the Internal Revenue Service found that Taxpayer was not responsible for unpaid federal withholding taxes arising from the Indiana restaurants involved in the subject assessments. Taxpayer’s employment by the corporation was terminated August 6, 1997. His stock was transferred to another officer. Taxpayer has sustained his burden of proving that he did not have the statutory duty to see that the withholding taxes were properly remitted to Indiana.

Finding

Taxpayer’s protest is sustained.